**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-1918**

In the Matter of the Welfare of the Children of: G. S. and J. A. L., Parents

**Filed April 30, 2012**
**Affirmed**
**Collins, Judge**[*]

Hennepin County District Court
File No. 27-JV-11-3926

Bill Ward, Hennepin County Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for respondent G.S.)

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Considered and decided by Wright, Presiding Judge; Hudson, Judge; and Collins, Judge.

**U N P U B L I S H E D  O P I N I O N**

**COLLINS**, Judge

In this appeal from the district court's disposition of two children adjudicated to be in need of protection or services (CHIPS), appellant-father J.A.L., argues that the district court (1) made best interests findings that are cursory, unsupported by the record, and

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

which fail to adequately address the statutory factors; and (2) failed to consider alternative dispositions for the children. Respondent Hennepin County Human Services and Public Health Department argues that because it returned the children to respondent-mother G.S. in December 2011, father's challenges to the placement are moot. We decline to dismiss the appeal as moot, and affirm.

## FACTS

Mother has a daughter, who is not father's child, and a son, for whom father signed a recognition of parentage (ROP). Father did not otherwise seek to establish a legal relationship with son. *See* Minn. Stat. § 257.75, subd. 3 (2010) (stating that an ROP is "a basis" for seeking custody or parenting time, but until the court orders otherwise, "the mother has sole custody"). Both children have spent much time living with father.

In January 2011, father, stemming from an August 2010 incident, was convicted of felony third-degree assault of mother.

In May, the county placed daughter in foster care and filed a CHIPS petition regarding both children, alleging, among other things, that father's assault of mother broke her eye socket, and that son was present at the assault. After an emergency hearing, the district court awarded the county interim custody of the children. Son was placed in foster care on May 18, and an interview of son suggested that, contrary to a no-contact order, father and mother may have spent May 18 together.

After a hearing to address whether father and mother violated the no-contact order, the district court declined to find that the parents violated the no-contact order, but continued to require the children to remain in out-of-home placement.

On the scheduled date for the CHIPS trial, mother admitted the allegations in the petition, and the district court solicited placement recommendations for the children. Father and mother each asked the court to place both children with father, the county asked that this request be denied because of chemical dependency concerns about father, and the guardian ad litem wanted the children to be placed together and with as little likelihood that they would be moved as possible, citing daughter's academic troubles and need for stability.

On August 22, 2011, the district court filed two orders. The first order adjudicated the children CHIPS, and stated that the district court had not considered any other disposition of the children. That order did not include a disposition of the children. The second order recited the various recommended dispositions of the children, and ruled that they would remain in their foster home.

Father then filed a motion seeming to object to the CHIPS adjudication, and to the disposition. After a hearing, the district court filed an order on September 30, concluding that father was not challenging the adjudication, and denying what it read as father's challenges to the disposition order.[1] This appeal followed in October, and in December the county returned the children to mother.

[1] At oral argument before this court, father admitted that he was not challenging the CHIPS adjudication.

## D E C I S I O N

### I

The county argues that the return of the children to mother renders moot father's challenges to their placement. Appellate courts "will not deem a case moot if it implicates issues that are capable of repetition, yet likely to evade review." *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). Although the county's return of the children to mother obviates any need for relief regarding their placement, a future removal could occur that, because of its short duration, might escape review. Therefore, we decline to dismiss father's challenges to the placement as moot.

### II

Father argues that the findings on which a CHIPS disposition is based must be supported by clear and convincing evidence. Identifying the applicable standard of proof "presents questions of law, which [appellate courts] review de novo." *C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008). "*Pursuant to* Minnesota Statutes § 260C.163, subd. 1(a)," clear and convincing evidence is the standard of proof in CHIPS matters. Minn. R. Juv. Prot. P. 39.04, subd. 1 (emphasis added). "To be proved *at trial*," allegations in a CHIPS petition "must be proved by clear and convincing evidence." Minn. Stat. § 260C.163, subd. 1(a) (2010) (emphasis added). Thus, "pursuant to" section 260C.163, subdivision 1(a), the clear and convincing evidence standard applies to issues *tried* in CHIPS matters.

In juvenile protection matters, "[a] trial is a hearing to determine whether the statutory grounds set forth in the petition are or are not proved." Minn. R. Juv. Prot.

P. 39.01. These trials are formally structured. *See* Minn. R. Juv. Prot. P. 39.03, subd. 2(b) (detailing structure). If a child is adjudicated CHIPS, the court "shall" conduct a "hearing" to determine a disposition for the child. Minn. R. Juv. Prot. P. 41.01. Unlike a trial, "[d]ispositional hearings shall be conducted in an informal manner." Minn. R. Juv. Prot. P. 41.04. Because rule 39.01 defines a "trial" as a "hearing" to determine whether the allegations in a petition are proved, and because the allegations in a CHIPS petition are *not* at issue at a disposition hearing—the CHIPS adjudication has already occurred—a disposition hearing is *not* a trial. Therefore, rule 39.04, subdivision 4 and section 260C.163, subdivision 1(a) do not compel application of the clear and convincing standard of proof to issues decided at CHIPS disposition hearings.

The cases father cites to argue otherwise do not involve a CHIPS disposition. *See In re Welfare of Clausen*, 289 N.W.2d 153 (Minn. 1980) (termination of parental rights); *In re Welfare of Rosenbloom*, 266 N.W.2d 888 (Minn. 1978) (termination of parental rights); *In re Welfare of B.A.B.*, 572 N.W.2d 776 (Minn. App. 1998) (CHIPS adjudication); *In re Welfare of D.T.J.*, 554 N.W.2d 104 (Minn. App. 1996) (termination of parental rights).[2] *Clausen*, *D.T.S.*, and *B.A.B.*, base their use of a clear-and-convincing standard of proof on *Rosenbloom*. *See Clausen*, 289 N.W.2d at 155 (citing *Rosenbloom*); *B.A.B.*, 572 N.W.2d at 778 (citing *Rosenbloom*, *Clausen*, and *D.T.S.*); *D.T.S.*, 554 N.W.2d at 108 (citing *Rosenbloom* and *Clausen*).

[2] Father cites two other cases to define "clear and convincing evidence." In this appeal, however, what constitutes "clear and convincing evidence" is not disputed.

In *Rosenbloom*, the supreme court addressed the standard of proof necessary to terminate parental rights. It ruled that, because, in termination matters, there is no danger that a parent will lose his or her liberty, the clear and convincing standard of proof, rather than the beyond a reasonable doubt standard, properly balances a parent's right to care custody and control of his or her child, against the child's safety and welfare interests. *Rosenbloom*, 266 N.W.2d at 889-90. A disposition hearing in a CHIPS matter, however, may not involve a parent, will not terminate parental rights, and in this case did not involve any type of permanent placement. Therefore, invoking *Rosenbloom* to require clear and convincing evidence would apply *Rosenbloom*'s result without acknowledging that the rationale for that result does not pertain to the present proceeding. Father has not shown that the clear and convincing evidence standard applies here. Moreover, on this record, we conclude that the disposition ordered by the district court is supported by clear and convincing evidence.

**III**

A CHIPS disposition order "shall contain written findings" supporting the disposition, including "a statement explaining how the disposition serves the best interests and safety of the child." Minn. R. Juv. Prot. P. 41.05, subd. 1(a); *see* Minn. Stat. § 260C.201, subd. 2(a) (2010) (same). A district court has "broad discretion" in making a CHIPS disposition. *In re Welfare of T.P.*, 492 N.W.2d 267, 268 (Minn. App. 1992).

**A. Sufficiency & specificity of findings**

Father argues that the district court made insufficient best-interests findings to support its disposition of the children. To argue on appeal that the district court's

findings are insufficient to support its resolution of an issue, a party must preserve that issue by arguing it to the district court. *In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 712 n.2 (Minn. App. 2004). Whether the record supports the findings that the district court made, however, may be argued on appeal without being formally preserved in the district court. Minn. R. Juv. Prot. P. 45.03. Here, while review of father's notice of motion, motion, and supporting memorandum seeking relief under rules 45.04 and 46.02 could suggest doubt about whether father adequately preserved a challenge to the sufficiency of the district court's best-interests findings, we will address the point.

Initially, to the extent that father's argument assumes that the factors listed in rule 41.05, subdivision 1(c) are factors that a district court should use to identify and address a child's best interests, we reject the argument. A disposition order is to contain findings "reviewing *the agency's use of the factors* [in rule 41.05, subdivision 1(c)] in making the foster care placement." Minn. R. Juv. Prot. P. 41.05, subd. 1(c) (emphasis added).

Additionally, father failed to show prejudice from the alleged lack of findings. *See In re Welfare of Children of J.B.*, 698 N.W.2d 160, 166 (Minn. App. 2005) (noting that, to prevail on appeal, a party must show both error and prejudice arising from the error). Nor is it even clear that all of the factors listed in the rule are even at issue in this case. *See Justis v. Justis*, 384 N.W.2d 885, 891 (Minn. App. 1986) (indicating that a district court is not required to make findings on all of the spousal maintenance factors if some of them are not at issue or were not before the district court for decision), *review denied* (Minn. May 29, 1986). Moreover, implicit in the findings that the district court did make is its view of several of the factors about which father complains. *See In re*

*Welfare of the Child of D.L.D.*, 771 N.W.2d 538, 545 (Minn. App. 2009) (acknowledging that a district court can make implicit findings). Absent more, we, on this record, reject father's argument that the district court's best-interests findings are insufficient.

Likewise, we reject father's argument that the district court's findings are insufficiently specific under *In re Welfare of M.M.*, 452 N.W.2d 236 (Minn. 1990). In *M.M.*, the district court's findings which the supreme court ruled to be insufficiently specific, referred only to the testimony of the county's witnesses and the mother's custodial preference. 452 N.W.2d at 239. Here, in addition to summarizing the position of the county, the district court summarized the positions of father, mother, and the GAL. It then found that leaving the children in their foster home was in their best interests because (a) they—particularly daughter—needed stability, (b) mother was in chemical dependency treatment and it was unclear whether she would complete her program, (c) where father lived was "apparently" fluid and he had possibly lived with a sex offender, (d) it was unclear who was then living with father, and (e) the district court was concerned that son may have been present when father assaulted mother. Further, unlike *M.M.*, the district court issued a separate September 30, 2011 order rejecting father's challenges to the disposition, including his challenges to the findings regarding the disposition, and stating that it will not alter its disposition. Thus, unlike the limited findings in *M.M.*, here the district court addressed the disposition in its disposition order, and then re-addressed the issue in a second order.

**B. Support for the findings**

Father alleges that the record does not support the findings in which the district court explained why it is in the children's best interests to leave them in their foster home. Dispositional findings are accepted by an appellate court unless they are clearly erroneous. *T.P.*, 492 N.W.2d at 268. Appellate courts defer to district court credibility determinations. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996); *see D.L.D.*, 771 N.W.2d at 545 (acknowledging that a district court's credibility determination may be implicit). Also, the importance of stability in a child's life, especially in the child's relationship with a primary caretaker, is significant. *M.M.*, 452 N.W.2d at 240.

After reviewing this record, especially father's testimony, the report of the guardian ad litem regarding placement, and the district court's statements indicating that it was not confident that it was "getting the whole story in the evidentiary proceeding[,]" we conclude that the record supports both the district court's findings and its disposition of these children. *See Wilson v. Moline*, 234 Minn. 174, 182, 47 N.W.2d 865, 870 (1951) (stating that an appellate court need not "discuss and review in detail the evidence for the purpose of demonstrating that it supports the trial court's findings" and that its "duty is performed when [it] consider[s] all the evidence . . . and determine[s] that it reasonably supports the findings"); *Vangsness v. Vangsness*, 607 N.W.2d 468, 474-75 n.1 (Minn. App. 2000) (applying *Wilson* in dissolution case).

**IV**

A disposition order "shall also set forth in writing" the dispositional alternatives considered by the district court, and why they were inappropriate. Minn. R. Juv. Prot.

P. 41.05, subd. 1. The home of "an individual who is related to the child by blood" is to be given priority when addressing the disposition of a child who has been adjudicated CHIPS. Minn. Stat. § 260C.212, subd. 2(a)(1) (2010). Father asserts that the district court failed to consider dispositions other than leaving the children in their foster home, particularly placement with him. The September 30, 2011 order states:

> [Father] was allowed to argue disposition at the hearing. The Court further allowed [father] and all other parties to make submissions [recommending placements for the children] following the hearing. The Court reviewed all submissions submitted by the parties before making its determination as to the disposition in the best interests of the children.

The record supports this finding. Further, because the record supports this finding, we conclude that the adjudication order's statement that the district court did not consider other dispositions is simply a misstatement. Therefore, we reject father's argument that the district court did not consider alternative dispositions.

Citing the preference for placing a child in the home of someone related to the child, father argues that if the district court considered alternative dispositions, he was not given the benefit of that preference. It is undisputed that father admitted the felony third-degree assault of mother. The CHIPS petition asserts both that the assault broke mother's eye socket and that son was present during the assault. In the disposition order, the district court qualified the finding that "[son] was *allegedly* present when father seriously assaulted mother[.]" (Emphasis added.) Father asserts that the record in this case does not show that son was, in fact, present.

The use of the word "allegedly," particularly in combination with doubts about the confused and incomplete information presented at the evidentiary hearing, suggests that the district court took into account that son may not have witnessed the assault, but that it nonetheless decided to leave the children in their foster home. Whether or not son was present for the assault, father cites no authority showing that a district court errs by refusing to place children for whom stability is important with a parent who moved several times in the recent past, admitted to housing one child with a sex offender, and pleaded guilty to a felonious assault of the children's mother.

**Affirmed.**